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Sintrans Asia Services Pte Ltd v Inai Kiara Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(A)-1539–09 OF 2014
ABDUL AZIZ ABDUL RAHIM, ROHANA YUSUF AND PRASAD ABRAHAM JJCA
22 MARCH 2016

C

Civil Procedure — Arbitration — Application to register arbitration award and for enforcement and costs award — Whether arbitration clause applicable — Whether arbitrator have jurisdiction — Whether respondent made out an argument for non-registration of award

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This was an appeal against the High Court's decision in dismissing the originating summons to register an arbitration award for the enforcement and the costs award. The respondent had agreed to hire the dredger 'Gibraltar' ('the vessel') from the appellant under a charter hire agreement ('the charter party'). The appellant had agreed to hire out the vessel to the respondent for a period of three months with an option to extend for another three months subject to parties agreeing on the terms of the extension including hire. The vessel was delivered to the respondent on 23 February 2013 and the same was redelivered to the appellant on 30 May 2013 having extended the charter party for eight days. The respondent had failed to make payment for the sum of US1,921,424.05 to the appellant in breach of the terms of the charter party. Subsequently, the appellant sent a notice of arbitration to the respondent and appointed a chartered Arbitration of the Arbitration Charters Singapore as its nominated arbitrator. As the respondent did not appoint a second arbitrator, the nominated arbitrator was appointed as the sole arbitrator. The respondent did not participate in the arbitration proceeding and the tribunal awarded the appellant for the sum claimed and also published the cost award and the addendum to the costs award. The respondent did not make payment of the sum stated in the award, hence the filling of the appellant's application at the trial court. The respondent submitted that the appellant had commenced proceedings in the Admiralty Court in Kuala Lumpur and as the pleadings had been closed the parties no longer intended to be bound by the arbitration clause and the same did not apply and conferred no jurisdiction on the arbitrator, thus the court should refuse recognition for purposes of enforcement. Hence, the appeal. The issue for determination was whether the respondent had made out an argument for non-registration of the said award under s 39(1)(a)(ii) and (v) and s 39(1)(b)(i) and (ii) of the Arbitration Act 2005 ('the Act').

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Held, allowing the appeal with costs:

(1) Clause 22 of the charter party stated that the arbitration shall be conducted in accordance with Singapore law and the curial law in respect of the arbitration would also be Singapore law. Since the respondent had failed to raise the issue in the courts in Singapore as required by the charter party, it was too late for the respondent to raise the matter at the stage of enforcement (see para 12).

(2) The respondent's argument about the admiralty proceedings was a nonstarter as one only had to look at the amended consent order made in the proceeding which would clearly showed that the disputes would have to proceed with arbitration (see para 14).

(3) The seat of arbitration pursuant to s 22 of the Act is the juridical seat of the arbitration and it is independent of the venue where hearings or other parts of the arbitral process occurred. The seat prescribed the procedural law of the arbitration. Thus, in challenges of this nature, the proper avenue for the same to be ventilated would be in the courts of Singapore. Since the seat of the arbitration was in Singapore, the anchor or judicial home by which the arbitration clause was to be assumed was the laws applicable in Republic of Singapore. The arbitration clause was clear in terms and parties had subjected themselves to be bound by it. Upon a careful examination of s 39(1)(a)(ii) and since the arbitration agreement clearly provides the law applicable to the arbitration agreement, the learned judge erred in law in subjecting the same to Malaysian law (see paras 13 & 15).

(4) The court in Malaysia is purely an enforcement court and must recognise valid arbitration award save and except for the exception provided under the law. A challenge on the validity of the arbitration clause should be established under Singapore law and the matter would have to be dealt with by the courts having supervisory jurisdiction at the seat of arbitration ie the Singapore courts or in the arbitration proceeding itself (see para 16).

[Bahasa Malaysia summary

Ini adalah satu rayuan terhadap keputusan Mahkamah Tinggi yang menolak saman pemula untuk mendaftarkan satu award timbang tara untuk penguatkuasaan dan kos award. Responden telah bersetuju untuk mengupah kapal korek 'Gibraltar' ('kapal') daripada perayu di bawah perjanjian piagam sewa ('pihak piagam'). Perayu bersetuju untuk menyewakan kapal tersebut kepada responden untuk tempoh tiga bulan dengan pilihan untuk melanjutkan selama tiga bulan lagi tertakluk kepada pihak-pihak bersetuju dengan syarat-syarat lanjutan termasuk sewa. Kapal tersebut telah diserahkan kepada responden pada 23 Februari 2013 dan kapal tersebut telah diserahkan kepada perayu pada 30 Mei 2013 selepas lanjutan diberikan kepada pihak piagam selama lapan hari. Responden telah gagal untuk membuat bayaran

untuk jumlah AS 1,921,424.05 kepada perayu dan melanggar syarat-syarat pihak piagam. Sehubungan dengan itu, perayu menghantar notis timbang tara kepada responden dan melantik seorang penimbang tara bertauliah daripada Piagam Timbangtara Singapura sebagai penimbang taranya yang dicalonkan. Memandangkan responden tidak melantik penimbang tara kedua, penimbangtara yang dicalonkan telah dilantik sebagai penimbang tara tunggal. Responden tidak mengambil bahagian dalam prosiding timbang tara dan tribunal mengawardkan perayu untuk jumlah yang dituntut dan juga menerbitkan kos award dan penambahan kepada kos award tersebut. Responden tidak membuat bayaran jumlah wang yang dinyatakan dalam award tersebut, maka permohonan perayu difailkan di mahkamah perbicaraan. Responden menghujah bahawa perayu telah memulakan prosiding di Mahkamah Admiralti di Kuala Lumpur dan memandangkan pliding-pliding telah ditutup, pihak-pihak tidak lagi bertujuan untuk terikat dengan klausa timbang tara dan pihak-pihak tidak memohon atau memberikan bidang kuasa kepada penimbang tara, oleh itu mahkamah sepatutnya menolak pengiktirafan untuk tujuan penguatkuasaan. Oleh itu, rayuan ini dibuat. Isu yang perlu ditentukan ialah sama ada responden telah membuat hujahan untuk ketidakdaftaran award tersebut di bawah s 39 (1) (a) (ii) dan (v) dan s 39 (1) (b) (i) dan (ii) Akta Timbang Tara 2005 ('Akta').

Diputuskan, membenarkan rayuan dengan kos:

(1) Klausa 22 parti piagam menyatakan bahawa timbang tara hendaklah dijalankan mengikut undang-undang Singapura dan undang-undang kurial berkenaan dengan timbang tara juga haruslah undang-undang Singapura. Memandangkan responden gagal untuk membangkitkan isu ini di mahkamah di Singapura seperti yang dikehendaki oleh pihak piagam, adalah sudah terlambat untuk responden membangkitkan perkara tersebut di peringkat penguatkuasaan (lihat perenggan 12).

(2) Hujahan responden mengenai prosiding admiralti adalah bukan pemula merujuk kepada perintah persetujuan pindaan dalam prosiding jelas menunjukkan bahawa pertikaian tersebut perlu diteruskan dengan timbang tara (lihat perenggan 14).

(3) Kerusi timbang tara menurut s 22 Akta adalah kerusi perundangan penimbangtaraan dan kerusi tersebut adalah bebas daripada tempat di mana perbicaraan atau bahagian-bahagian lain dalam proses timbang tara berlaku. Kerusi tersebut menetapkan undang-undang prosedur timbang tara. Oleh itu, dalam cabaran sebegini, saluran yang betul untuk hal tersebut dikemukakan seharusnya di Mahkamah Singapura. Memandangkan kerusi timbang tara berada di Singapura, 'anchor' atau rumah kehakiman di mana klausa timbang tara tersebut akan dianggap adalah undang-undang di Republik Singapura. Klausa timbang tara adalah jelas dalam terma-terma dan pihak-pihal telah meletakkan diri

mereka untuk terikat olehnya. Selepas pemeriksaan teliti s 39 (1)(a)(ii) dan memandangkan perjanjian timbang tara jelas memperuntukkan undang-undang yang terpakai kepada perjanjian timbang tara, hakim bijaksana terkhilaf dalam undang-undang kerana memperuntukkan perjanjian timbang tara kepada undang-undang Malaysia (lihat perenggan 13 & 15).

(4) Mahkamah di Malaysia adalah hanyalah mahkamah penguatkuasaan dan perlu mengiktiraf award timbang tara yang sah melainkan dan kecuali untuk pengecualian yang diperuntukkan di bawah undang-undang. Cabaran ke atas kesahihan klausa timbang tara perlu dibuktikan di bawah undang-undang Singapura dan perkara tersebut perlu diuruskan oleh mahkamah yang mempunyai bidang kuasa menyelia di kerusi timbang tara iaitu Mahkamah Singapura atau dalam prosiding timbang tara itu sendiri (lihat perenggan 16).]

Notes

For cases on arbitration in general, see 2(1) *Mallal's Digest* (5th Ed, 2015) paras 2023–2038.

Cases referred to

Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc [2001] CLC 173, HC (refd)

Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd [2010] 2 MLJ 23, FC (refd)

The Government of India v Cairn Energy India Pty Ltd & Anor [2011] 6 MLJ 441; [2012] 3 CLJ 423, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 22, 39(1)(a)(ii), (v), (10(b)(i), (ii)

Reciprocal Enforcement of Judgment Act 1958

Appeal from: Originating Summon No 24NCC(ARB)-30–06 of 2014 (High Court, Kuala Lumpur)

Mohan Das Nair (Rahayu bt Abd Ghani and Ang Lay Ling with him) (Rahayu Partnership) for the appellant.

R Thayalan (R Thayalan) for the respondent.

Prasad Abraham JCA:

[1] We heard this appeal on 23 April 2015 and allowed the same with costs. This was an appeal against the order of the High Court dated 29 August 2014, dismissing the originating summons dated 13 June 2014, filed by the appellant to register an arbitration award dated 7 March 2014, for enforcement and the

costs award dated 12 May 2014, hereinafter referred to as the said award for costs. We append below our grounds for so doing. We shall refer to the parties as they were described in the High Court ie the appellant plaintiff and the respondent defendant.

BACKGROUND FACTS

[2] By a charter hire agreement dated 15 February 2013 ('the charter party') made between the plaintiff who is the *disponent owner* of the dredger 'Gibraltar'('the vessel') and the defendant as the charterer, the defendant had agreed to hire the vessel from the plaintiff.

[3] The plaintiff had agreed to hire out the vessel to the defendant under the charter party for a period of three months with an option to extend for another three months subject to parties agreeing on the terms of the extension including hire.

[4] On the 23 February 2013, the vessel was delivered by the plaintiff to the defendant at Bintulu Sarawak. On 30 May 2013, the defendant redelivered the vessel to the plaintiff having extended the charter party for eight (8) days form 23 May 2013 to 30 May 2013.

[5] In breach of the terms of the charter party, the defendant has failed to make payment for the sum of US$1,921,424.05 to the plaintiff.

[6] On the 12 September 2013, the plaintiff sent a notice of arbitration to the defendant and appointed Professor Neale R Gregson a chartered arbitration of the Arbitration Charters Singapore as its nominated arbitrator. As the defendant did not appoint a second arbitrator, the said professor was appointed the sole arbitrator.

[7] The defendant did not participate in the arbitration proceedings. On 7 of March 2014, the tribunal awarded the plaintiff the sum claimed by the plaintiff against the defendant. The tribunal also published the costs award dated 12 May 2014 and the addendum to the costs award dated 19 May 2014.

[8] The defendant did not make payment of the sum stated in the said award, hence the filing of the plaintiff's application.

[9] We are of the view that, the only issue for this court to consider is whether the defendant had made out an argument for non-registration of the said award under s 39(1)(a)(ii), (v), 39(10(b)(i) and (ii) of the Arbitration Act 2005. Reference is also drawn to the relevant provisions of the Reciprocal Enforcement of Judgment Act 1958.

[10] The defendant argued the plaintiff had commenced proceedings in the Admiralty Court in Kuala Lumpur and pleadings had been closed. It followed therefore, that parties no longer intended to be bound by the arbitration clause and the same did not apply and conferred no jurisdiction on the arbitrator and the court should refuse recognition for purposes of enforcement.

[11] To address this issue, we have to first look at the arbitration clause in the charter party ie cl 22 (see *rekod rayuan jld 2 Bahagian* B&C p 108) which we set out below:

> *This Contract shall be governed by and construed in accordance with Singapore law. Any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination shall be referred to and finally resolved by arbitration in Singapore in accordance with the Singapore International Arbitration Act (Chapter 143A) and any statutory modification or re-enactment thereof save to the extent necessary to give effect to the provisions of this Clause.*
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> The arbitration shall be conducted in accordance with the Arbitration Rules of the Singapore Chamber of Maritime Arbitration (SCMA) current at the time when the arbitration proceedings are commenced.
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> The reference to arbitration of disputes under this clause shall be to three arbitrators. A party wishing to refer a dispute to arbitration shall appoint its arbitrator and send notice of such appointment in writing to the other party requiring the other party to appoint its own arbitrator and give notice that it has done so within fourteen (14) calendar days of that notice and stating that it will appoint its own arbitrator as sole arbitrator unless the other party appoints its own arbitrator and gives notice that it has done so within the fourteen (14) days specified. If the other party does not appoint on arbitrator and does not give notice that it has done so within the fourteen (14) days specified, the party referring a dispute to arbitration may, without the requirement of any further prior notice to the other party, appoint its arbitrator as sole arbitrator and shall advise the other party accordingly. The award of a sole arbitrator shall be binding on both parties as if he had been appointed by agreement.
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> Nothing herein shall prevent the parties agreeing in writing to vary these provisions to provide for the appointment of a sole arbitrator.
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> In cases where neither the claim nor any counterclaim exceeds the sum of USD 50,000 (or such other sum as the parties may agree) the arbitration shall be conducted before a single arbitrator in accordance with the SCMA Small Claims Procedure current at the time when the arbitration proceedings are commenced. (Emphasis added.)

[12] Clause 22 clearly provides that the arbitration shall be conducted in accordance with Singapore law and the curial law in respect of the arbitration would also be Singapore law. Since the defendant had failed to raise this issue in the courts in Singapore as the charter party provides, in our view it is too late in the day for the defendant to raise the matter at the stage of enforcement. In

the Federal Court decision in *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* [2010] 2 MLJ 23 where we refer to the judgment of His Lordship Arifin Zakaria CJ (Malaya) (as he then was) at pp 151–152 of the judgment, and we quote:

> [42] The next issue raised by the respondent is that the respondent was never a party to the arbitration agreement. In this regard I agree with the submission for the appellant that if that is so, it is for the respondent to apply to the English Court, being the court having supervisory jurisdiction, to have the award set aside instead of raising the issue before our court, which is merely an enforcement court.
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> [43] *As observed by Coleman J in A v B (No 2)* [2007] 1 Lloyd's Rep 358:
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> > *... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.*
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> [44] In *Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd* [1993] 2 MLJ 396; [1993] 3 CLJ 532, it was similarly held that a party who had been given every opportunity to submit and to take part in arbitration proceedings in London ought to have challenged the conduct of the arbitrator and/or validity of the award in the English Courts and not here. Similarly in *Hebei Import & Export Corporation v Polytech Engineering Company Limited* FAC V No 10 of 1988 (Hong Kong), the Court of Final Appeal of Hong Kong held that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point or issue before the court of enforcement. (Emphasis added.)

[13] The Arbitration Act 2005 in particular s 22 defines the seat of arbitration. We would hold that seat of arbitration is the juridical seat of the arbitration and it is independent of the venue where hearings or other parts of the arbitral process occurred. The seat prescribed the procedural law of the arbitration (see *Russel on Arbitration (2003)*, p 185, para 5–091). We also refer to the judgment of Alkens J in *Dubai Islamic Bank PJSC v Paymentech Merchant Services Inc* [2001] CLC 173 where His Lordship held and we quote:

> Although English courts were familiar with the concept of the 'seat' of an arbitration before the 1996 Act was passed (see, eg the *Peru case* [1988] 1 Lloyd's Rep 116; *India (Union) v McDonnell Douglas Corpn* [1993] 2 Lloyd's Rep 48; *Sumitomo Heavy Industries v Oil & Natural Gas Commission* [1994] 1 Lloyd's Rep 45) the use of the concept in an English statute concerning arbitration is new. It is clear from s 2(1) of the Act that the concept is used in order to define which arbitrations will be subject to the statutory regime in Pt I of the 1996 Act. (There are some refinements to this, which are unnecessary to consider for present purposes.) Part I of the Act gives the English court important powers in relation to arbitration proceedings which will be exercisable at different stages of an arbitration. *Therefore, in general, only those arbitrations that have their 'seat' in England and Wales should be subject to the exercise of the court's powers in Pt. I of the Act. The Act uses the concept of the 'seat' as the*

test for the exercise of Pt I powers rather than the choice of procedural law made by the parties in their arbitration agreement. This seems clear from the wording of s 4(4) and (5) of the Act. Section 4(1) and (2) stipulate that there will be 'mandatory' and 'non-mandatory' provisions in Pt I. The Pt I regime applies 'whether or not the law applicable to the parties' agreement is the law of England and Wales or, as the case may be, Northern Ireland' (s 4(4) of the Act). But if the parties have chosen another procedural law for the arbitration or particular aspects of it, then, in relation to non-mandatory provisions in Pt I, the effect will be as if the parties had made a specific agreement dealing with those matters (s 4(5) of the Act).

Close to home, we refer to the Federal Court's decision in *The Government of India v Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441; [2012] 3 CLJ 423 to the judgment of Richard Malanjum CJ (Sabah & Sarawak), at pp 439–440 of the judgment and we quote:

> [22] Thus, the appellant submits that English law applies for the setting aside of the award since the curial law of the seat of arbitration had lapsed upon the grant of the award. The respondents reject this approach and argue that the curial law effectively remains to be Malaysian law for the setting aside of the award.
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> [23] We are inclined to agree with the contention of the respondents. Our courts had in a prior occasion taken the view that the seat of the arbitration is the place where challenges to an award are made. In *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* [2010] 2 MLJ 23 ; [2010] 1 CLJ 137, this court referred to the English case of *A v B* [2007] 1 Lloyd's Rep 237 which decided that challenges are to be made at the courts of the seat of arbitration. Thus, for now we find no reason to depart from the current position of the law.
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> [24] Indeed in *C v D* [2007] EWCA Civ 1282; [2007] All ER (D) 61 Longmore LJ at para 17 said this:
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> *It follows from this that a choice of seat for the arbitration must be a choice of forum for remedies seeking to attack the award*. As the judge said in para 27 of his judgment, as a matter of construction of the insurance contract with its reference to the English statutory law of arbitration, the parties incorporated the framework of the 1996 Act. He added that their agreement on the seat and the 'curial law' necessarily meant that any challenges to any award had to be only those permitted by that Act. In so holding he was following the decisions of Colman J in *A v B* 2006] EWHC 2006 (Comm)[2007] 1 All ER (Comm) 591; [2007] 1 Lloyd's Rep 237 and *A v B (No 2)* [2007] EWHC 54 (Comm)[2007] 1 All ER (Comm) 633; [2007] 1 Lloyd's Rep 358 in the first of which that learned judge said (para 111):
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> ... an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration.
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> That is, in my view, a correct statement of the law... .
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> *[25] It is therefore clear that the English Court of Appeal clearly sets out that the curial*

law ought to be that of the seat of arbitration. As stated above, our courts have adopted a similar position. Thus, in this case as Kuala Lumpur was selected as the juridical seat of arbitration, the curial law is the laws of Malaysia and we so hold. And we would add that it is vital for parties to follow the mandatory rules of the seat of arbitration since the application of such mandatory procedural rules (curial law) of the seat will remain subject to the jurisdiction and control of the courts of the seat of the arbitration including when considering applications to set aside awards. We are therefore not persuaded that the decisions of the Indian Supreme Court should be applied. (Emphasis added.)

It follows therefore that in challenges of this nature, the proper avenue for the same to be ventilated would be in the courts of Singapore.

[14] The defendant's argument about the admiralty proceedings really in our view is a nonstarter as one only has to look at the amended consent order made in those proceedings which will clearly show the disputes would have to proceed with arbitration (*rekod rayuan Jld 4, Bahagian C* pp 245–248).

[15] The validity of the arbitration agreement which we have referred to is to be determined by the law of the country where the award was made. In our particular case since the seat of the arbitration was in Singapore, the anchor or juridical home by which the arbitration clause is to be assumed is the laws applicable in Republic of Singapore. The arbitration clause is clear in terms and parties have subjected themselves to be bound by it. Upon a careful examination of s 39(1)(a)(ii) and since the arbitration agreement clearly provides the law applicable to the arbitration agreement, the learned judge erred in law in subjecting the same to Malaysian law.

[16] The court in Malaysia is purely an enforcement court and must recognise a valid arbitration award save and except for the exception provided under the law. If the defendant in this case argues that the arbitration clause is not valid then they would have to establish that it is so under the Singapore law. And the matter would have to be dealt with by the courts having supervisory jurisdiction at the seat of arbitration ie the Singapore courts or in the arbitration proceeding itself.

[17] For all the aforesaid reasons set out above, we allowed the appeal with costs.

Appeal allowed with costs.

Reported by Dzulqarnain Ab Fatar